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No. 269 Miscellaneous

In the Supreme Court of the United States

OCTOBER TERM, 1948

UNITED STATES OF AMERICA, PETITIONER

v.

NATIONAL CITY LINES, INC., PACIFIC CITY LINES, INC., FIRESTONE TIRE & RUBBER COMPANY, GENERAL MOTORS CORPORATION, PHILLIPS PETROLEUM COMPANY, MACK MANUFACTURING CORPORATION, STANDARD OIL COMPANY OF CALIFORNIA, AND FEDERAL ENGINEERING CORPORATION

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION, AND MOTION FOR LEAVE TO FILE

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 269, MISCELLANEOUS

UNITED STATES OF AMERICA, PETITIONER

v.

NATIONAL CITY LINES, INC., PACIFIC CITY LINES, INC., FIRESTONE TIRE & RUBBER COMPANY, GENERAL MOTORS CORPORATION, PHILLIPS PETROLEUM COMPANY, MACK MANUFACTURING CORPORATION, STANDARD OIL COMPANY OF CALIFORNIA, AND FEDERAL ENGINEERING CORPORATION

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI

Now comes the Acting Solicitor General and respectfully moves this Court for leave to file the annexed petition for writ of certiorari under Section 1651 of Title 28, United States Code (formerly Section 262, Judicial Code, 28 U. S. C. 377), directed to the District Court of the United States for the Southern District of California, Central Division, to review an order and judgment of that court entered on October 28, 1948, and more particularly described in the petition, and for such other and further relief as may be just and proper.

GEORGE T. WASHINGTON,
Acting Solicitor General.

DECEMBER 1948.

816204—48——1.

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PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

The Acting Solicitor General prays that a writ of certiorari be issued to review a judgment and order, entered on October 28, 1948, by the United States District Court for the Southern District of California, Central Division, transferring the civil proceeding which was pending in that court, and in which the United States charged the above-named respondents with violations of the Sherman Act, to the United States District Court for the Northern District of Illinois, Eastern Division.

OPINION BELOW

The opinion of the district court rendered on respondents' motions to transfer the action has not yet been reported. A copy of this opinion is attached to this petition as Exhibit B of the Appendix to the petition (*infra*, pp. 20–43). An opinion by this Court and an opinion by the district court, rendered at prior stages of the present proceeding, are reported, respectively, in 334 U. S. 573 and 7 F. R. D. 456.

JURISDICTION TO REVIEW

The date of the order and judgment of the district court sought to be reviewed is October 28, 1948.[1]

The jurisdiction of this Court is invoked under Section 1651 (a) of Title 28, United States Code (formerly Section 262 of the Judicial Code, 28 U. S. C. 377), as enacted by Public Law 773, 80th Cong., 2d Sess.

Section 2 of the Act of February 11, 1903, as amended (15 U. S. C. 29), confers upon this Court exclusive appellate jurisdiction of civil suits brought by the United States under the

[1] The court signed the judgment and order on October 27, 1947, and the clerk entered judgment on October 28, 1947. Under Rule 58 of the Federal Rules of Civil Procedure the latter date constitutes the entry of judgment.

Sherman Act. Grant of the common law writ of certiorari, as authorized by Section 1651 (a) of Title 28, United States Code, is sought in aid of such exclusive appellate jurisdiction.

The following decisions sustain the power and jurisdiction of this Court to review the order and judgment review of which is herewith sought:

United States Alkali Export Assn., Inc. v. *United States*, 325 U. S. 196

DeBeers Consolidated Mines, Ltd. v. *United States*, 325 U. S. 212

The special and unusual circumstances which warrant exercise by this Court of its discretionary power to issue the common law writ of certiorari, as requested in this petition, are set forth later under the heading "Reasons for Granting the Writ" (*infra*, pp. 9–18).

QUESTION PRESENTED

The single question which the Government seeks to have this Court review is whether Section 1404 (a) of Title 28, United States Code, as enacted by Public Law 773, 80th Cong., 2d Sess., applies to proceedings under the antitrust laws governed by the venue provisions of Section 12 of the Clayton Act. The question, otherwise stated, is whether Section 1404 (a) amends Section 12 of the Clayton Act and takes away the right which that section gives to the plaintiff—to have his suit

tried in any district "specified by the statute and selected by the plaintiff"[2]—by authorizing the court of the district in which the action was instituted to transfer it to any other district where it might have been brought.

STATUTES INVOLVED

Section 12 of the Act of October 15, 1914, 38 Stat. 730, 15 U. S. C. 22, known as the Clayton Act, provides as follows:

> That any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

The Act of June 25, 1948, Public Law 773, 80th Cong. 2d Sess., which is entitled "An Act To revise, codify, and enact into law title 28 of the United States Code entitled 'Judicial Code and Judiciary'," provides in Section 1:[3]

> That title 28 of the United States Code, entitled "Judicial Code and Judiciary" is hereby revised, codified, and enacted into

[2] See *United States* v. *National City Lines, Inc.*, 334 U. S. 573, 582.

[3] Section 38 of the Act provides that its provisions shall take effect on September 1, 1948.

law, and may be cited as "Title 28, United States Code, section —", as follows:

* * * * *

§ 1404. Change of venue

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

(b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.

(c) A district court may order any civil action to be tried at any place within the division in which it is pending.

* * * * *

§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions agreeable to the usages and principles of law.[1]

[1] The Reviser's Notes state that this Section is expressive of the construction placed upon Section 262 of the Judicial

STATEMENT

The United States instituted this action on April 10, 1947, when it filed a civil suit in the Southern District of California charging the respondents with violating Sections 1 and 2 of the Sherman Act.[5] Respondents' motions to dismiss the action upon the ground that the Southern District of California is not a convenient forum for the trial were sustained by the district court, and a judgment dismissing the complaint, without prejudice to institution of a similar proceeding against the same respondents in a more appropriate and convenient forum, was entered on October 15, 1947. On appeal to this Court, the judgment of dismissal was reversed. The Court held that Congress, when it enacted Section 12 of the Clayton Act in order to enlarge the venue of proceedings under the antitrust laws, intended that the venue selected by the plaintiff should be free from attack upon the basis of the *forum non conveniens* doctrine,

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Code (28 U. S. C. 377) by this Court in *U. S. Alkali Export Assn., Inc.* v. *United States*, 325 U. S. 196, and *DeBeers Consolidated Mines, Ltd.* v. *United States*, 325 U. S. 212 (H. Rep. No. 308, 80th Cong., 1st Sess., p. A145).

[5] The present respondents include all of the respondents in *United States* v. *National City Lines*, 334 U. S. 573, except American City Lines, Inc. That respondent was merged with respondent National City Lines, Inc., on July 15, 1946, and the district court by the judgment which it signed on October 27, 1948, dismissed the cause as to American City Lines, Inc. (see *infra*, p. 44).

and that the district court was therefore without power to dismiss the action upon this ground. *United States v. National City Lines, Inc.*, 334 U. S. 573.

After the district court had received the mandate of this Court, the various respondents on August 5, 1948, filed notices that they would move the court on September 20, 1948, pursuant to their respectively annexed motions, to transfer the action to the United States District Court for the Northern District of Illinois, Eastern Division. All of these motions were based upon Section 1404 (a) of Title 28 of the United States Code and, in substance, are the same. The motion made by National City Lines, Inc., American City Lines, Inc., and Pacific City Lines, Inc., which is representative of all the others, is set forth in Exhibit A of the Appendix to this petition (*infra*, pp. 19–20).

The district court, after having heard argument on the motions to transfer, rendered an opinion on October 12, 1948, holding that Section 1404 (a) of Title 28 of the United States Code applies to the present action. The court believed that not only did the language of the section make it applicable to all civil actions, including those under the antitrust laws, but that the general purposes and structure of Public Law 773, 80th Cong., 2d Sess., and its legislative history support the view that Section 1404 (a) applies, without exception, to every civil action

brought in a federal district court. The court, having determined that the section vested it with power to transfer the present action, held that the facts of the particular case were such as to call for exercise of this power. The full text of the court's opinion is set forth in Exhibit B of the Appendix to this petition (*infra*, pp. 20–43).

On October 27, 1948, the district court filed findings of fact[*] and a conclusion of law which reads: "The convenience of the parties and witnesses and the interest of justice require that this suit be transferred to the United States District Court for the Northern District of Illinois, Eastern Division." It signed on the same day a judgment and order, which the clerk entered on October 28, 1948, transferring the cause to the United States District Court for the Northern District of Illinois, Eastern Division.[†] By an order signed on November 1, 1948, execution of the judgment and order of transfer was stayed until December 2, 1948. By a further order signed on November 29, 1948, this stay was extended until December 13, 1948, and, if a motion for leave to file petition for writ of

[*] Since the only question of which review is sought is the district court's *power* to transfer the present action, and since the district court's findings of fact are relevant only to the propriety of *exercise* of such power, assuming that it exists, the Government has not included the court's findings of fact in the Appendix to its petition.

[†] The judgment is set forth in Exhibit C of the Appendix to the petition (*infra*, p. 44).

certiorari should have been filed with this Court by December 13, 1948, until 20 days after this Court should have taken final action on said motion and petition.[8]

REASONS FOR GRANTING THE WRIT

I

The question presented for review—whether Section 1404 (a) struck down the right, conferred by Section 12 of the Clayton Act, that civil proceedings under the antitrust laws shall be tried in the district selected by the plaintiff—affects all future, as well as pending, proceedings of this character, whether the plaintiff be the United States, a private party, or a state or municipality.[9]

The question whether Section 1404 (a) effects such a change in the law is of large public importance both because of the numerous proceedings in which the issue is likely to arise and because interjection of this issue would materially frustrate "Congress' declared policy of expediting this type of litigation."[10] Aside from these

[8] The stay order of November 29, 1948, is set forth in Exhibit D of the Appendix to this petition (*infra*, pp. 45–46).

[9] Of the 87 pending civil suits brought by the United States under the antitrust laws, the issue will probably not arise in the 46 which have been tried, or in which trial has started or a definite trial date has been fixed.

[10] *United States v. National City Lines, Inc.*, 334 U. S. 573, 589. See also *idem*, pp. 590–591. In addition to the statutory provisions cited in Note 36 of the Court's opinion (pp. 589–590), Section 4 of the Sherman Act, 15 U. S. C. 4, pro-

considerations which make it of public importance that the review which is here sought be granted, the fact that the injury resulting from the alleged error of the district court cannot be redressed on appeal from final judgment is a further exceptional circumstance calling for exercise by this Court of its revisory appellate power over an inferior court which is allegedly overstepping the limits of its statutory authority.

We submit that there is no adequate remedy, apart from the writ herein sought, for the injury resulting from an unauthorized transfer of the cause to the federal court of another district. Section 2 of the Expediting Act allows appeal only from the "final" judgment of the district court and the order of transfer is an interlocutory, not a final judgment. Appeal, following entry of final judgment by the court of transfer, would not redress or correct the error committed. If final judgment should be for the plaintiff, it could not show that its rights were prejudiced by a judgment running in its favor. If judgment should be for the defendant, the only ground for attacking the judgment on the basis of the transfer would seem to be that the court of transfer lacked jurisdiction.[11] Not only would the relief

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vides that the district courts shall hear and determine the Government's civil suits under that Act "as soon as may be."

[11] If the court of transfer had jurisdiction, error in making the transfer would not appear to be, after actual trial, prejudicial error.

obtained if such attack were successful—retrial of the cause *ab initio* in the district in which suit had started—be of dubious value to the plaintiff, but it is not at all certain that the plaintiff could show, at that stage of the proceedings, lack of jurisdiction in the court of transfer. The cause of action would be within the jurisdiction of the court. It would have jurisdiction of the defendants by their express consent, and the plaintiff, having, after transfer, prosecuted its cause in the court of transfer, might be deemed to have submitted to the jurisdiction of that court.

Whether Section 1404 (a) overturned, as to a most important type of civil litigation, the statutory policy which had prevailed for 34 years presents an issue which, we submit, is of greater public importance than the questions presented in two recent cases in which this Court issued the common law writ of certiorari to review interlocutory orders entered in civil proceedings under the Sherman Act.

In *United States Alkali Export Assn., Inc. v. United States*, 325 U. S. 196, the issue which was reviewed was whether the United States was authorized to bring a civil proceeding against alleged violations of the Sherman Act by export associations, prior to proceedings by the Federal Trade Commission, as authorized by Section 2 of the Webb-Pomerene Act, with respect to the alleged violations. While the error asserted in that case and in the present one is that the action

of the district court frustrates the policy of Congress respecting the jurisdiction of federal district courts, in the one case by an unauthorized assumption of jurisdiction and in the other by an unauthorized refusal to entertain jurisdiction, the greater public gravity of the issue here lies in the fact that it concerns, not a jurisdictional question arising for the first time under statutory provisions which had been in effect 27 years, but one presented and decided within less than two months of the effective date of the new statute and expected to arise in numerous other cases. The similar question of the application of Section 1404 (a) to suits under the Federal Employers' Liability Act has already resulted in decisions in at least nine cases.[12]

In *DeBeers Consolidated Mines, Ltd.* v. *United States*, 325 U. S. 212, the question reviewed was whether the district court had exceeded its statutory authority in the relief which it had granted by the preliminary injunction which it had issued.

[12] *Hayes* v. *Chicago, Rock Island & Pacific R. R. Co.* (D. C. Minn.) and four companion cases, decided September 25, 1948 (see Note 46 of the district court's opinion in present case, *infra*, p. 43); *Pascarella* v. *N. Y. Central R. R. Co.* (E. D. N. Y.), decided November 19, 1948; *Nunn* v. *C., M., St. P. & P. R. R. Co.* (S. D. N. Y.), decided November 9, 1948; *Kilpatrick* v. *Texas & Pacific Ry. Co.* (S. D. N. Y.), decided November 12, 1948 (motion for leave to file petition pending in this Court, No. 233 Misc.); *Collett* v. *Louisville & Nashville R. R. Co.* (E. D. Ill.), decided October 18, 1948 (motion for leave to file petition pending in this Court, No. 206 Misc.).

There, as here, the injury caused by the district court's interlocutory order could not be redressed by any final judgment which might be entered. But the public importance of the issue presented here is incomparably greater than that passed upon in the *DeBeers* case. The former concerns enforcement by the United States of a statute regulatory of the nation's trade and commerce and the issue is one which, until settled by this Court, will constantly plague litigants and district courts. The alleged error in the *DeBeers* case, on the other hand, affected only a small number of affiliated foreign corporations and would seldom, if ever, occur again.

II

We urge, as a further reason for allowance of writ of certiorari, that the district court's interpretation of Section 1404 (a) is erroneous.

Congress has long had the policy of establishing special venue and jurisdictional provisions for civil suits under the antitrust laws. As to suits brought by the United States, Section 5 of the Sherman Act (15 U. S. C. 5) provides that the court may summon before it parties defendant not resident in the district of suit. Section 7 of the Act (later superseded by Section 4 of the Clayton Act, 15 U. S. C. 15), which authorized triple damage suits by private parties injured by violation of the Act, fixed the venue of such suits.

By sections 4 and 12 of the Clayton Act, Congress further liberalized the venue of suits under the antitrust laws, and provided that the considerable range in choice thereby given to the plaintiff as to the district in which to prosecute his action, included the right to trial of the cause in the district in which suit had been instituted. *United States* v. *National City Lines, Inc.*, 334 U. S. 573.

The question sought to be reviewed is whether statutory provisions, framed in general terms broad enough to embrace every civil action in a federal district court, repealed by implication the foregoing right to trial in the district of the plaintiff's choice, conferred by special legislation dealing with a particular type of proceeding. Certainly there was no such implied repeal if effect is given to the general rule that "where there are two statutes upon the same subject, the earlier being special and the later general, the presumption is, in the absence of an express repeal, or an absolute incompatability, that the special is intended to remain in force as an exception to the general" (*Washington* v. *Miller*, 235 U. S. 422, 428, and cases cited).

There is clear indication, irrespective of this rule of construction, that Congress never intended such implied repeal. Public Law 773, 80th Cong., 2d Sess. is entitled "An Act to revise, codify, and enact into law" Title 28 of the United States Code. The major purposes of the Act were to

make the provisions of this title the law rather than merely presumptive evidence of the law, to arrange these provisions in a logical order, to remove existing inconsistencies and ambiguities in them, and to eliminate those which had been impliedly repealed or had become obsolete.[12] Since the venue provisions of the Clayton Act have never been included in Title 28 of the United States Code and have not been codified by Public Law 773 (see Chapter 87), they are not within the Act's scope and are to be deemed not affected by its provisions.

Public Law 773 is legislation of a highly technical character and its drafting was delegated to a staff of editors of two law publishing firms.[14] It sponsors and draftsmen repeatedly stated that the purpose was to avoid making any changes in substantive law of a controversial nature.[15] The House Report on the bill states that "minor changes were made in the provisions regulating the venue of district courts in order to clarify ambiguities or to reconcile conflicts" (H. Rep. No. 308, 80th Cong., 1st Sess., p. 6). The Senate

[12] S. Rep. No. 1559, 80th Cong., 2d Sess., pp. 1–2.

[13] H. Rep. No. 308, 80th Cong., 1st Sess., pp. 2–3.

[14] Hearings before Subcommittee No. 1 of House Judiciary Committee on H. R. 1600 and H. R. 2055, 80th Cong., 1st Sess., pp. 6, 11 (Congressman Keogh), 19 (Circuit Judge Maris), 24 (Barron, chief reviser), 32 (Circuit Judge Sanborn); 94 Cong. Rec. 8109 (Sen. Donnell, spokesman for Senate Judiciary Committee); S. Rep. No. 1559, 80th Cong., 2d Sess., p. 2.

Report emphasized that only noncontroversial changes were intended to be made in the law: "Many noncontroversial improvements have been effected which, while individually small in themselves, add up to a very substantial improvement in and modernization of the law relating to the Federal judiciary. At the same time great care has been exercised to make no changes in the existing law which would not meet with substantially unanimous approval." (S. Rep. No. 1559, 80th Cong., 2d sess., p. 2.)

Congress clearly entertained the view that the proposed legislation would make no substantial or controversial change in the law. The bill which became Public Law 773 was presented to both the Senate and the House via the consent calendar, rules were suspended, and the bill passed practically without debate (except for certain provisions relating to the United States Tax Court which were eliminated before passage).[16] There was no debate on Section 1404 (a). No reference was made to Section 12 of the Clayton Act in the Committee reports on the bill, in the House hearings on the bill or in the reviser's notes.

The district court believed that the reviser's notes to Section 1404 (a)[17] supported its interpretation of the section. If the note should be

[16] 93 Cong. Rec. 8550–8559; 94 Cong. Rec. 8108–8111, 8675–8678.

[17] H. Rep. No. 308, 80th Cong., 1st Sess., p. A132.

read as showing that the reviser intended that Section 1404 (a) should apply to suits under the Federal Employers' Liability Act, the obviously controversial change which would then be made in the law is so inconsistent with the scope and declared purposes of the legislation that the reviser's note may not properly, in this instance, be accepted as declaratory of congressional intent. Even if the note should be regarded as sufficient to override, with respect to the Federal Employers' Liability Act, all countervailing considerations, such effect is not to be extended to suits under the antitrust laws. The statutes in question are not related, and an intent to change the effect of the venue provisions of one of them does not necessarily show a like intent as to the other.

In summary, the Government's position is: Public Law 773 was intended to effect only minor and noncontroversial changes in the law. Section 1404 (a) was, we submit, intended to have the valuable but noncontroversial effect of giving to the district courts, in cases where the doctrine of *forum non conveniens* was previously applicable, power to transfer the action to another district, in substitution for the more drastic remedy of dismissing the action upon the ground of the inconvenience of the forum. A holding that Section 1404 (a) applies to suits under the antitrust laws requires the assumption that Congress had, *sub silentio,* made a substantial and controversial change in the rights conferred by

Section 12 of the Clayton Act, as that Section had been interpreted "without qualification" during the 34 years of its life (334 U. S. 573, 578). Nowhere in the legislative history of the Act is there the slightest indication that Congress so intended. The reviser's note to the section cannot be said to reflect the "deviation" from "established practice" represented by the ruling made by the district court in the present case on September 29, 1947. That decision was rendered more than six months after the submission of the reviser's notes to Congress on April 25, 1947 (H. Rep. 308, 80th Cong., 1st sess.). This Court's decision, upholding the inapplicability of *forum non conveniens* in antitrust cases, was delivered June 7, 1948. (334 U. S. 573.) The bill containing the new Judicial Code was passed by the Senate on June 12, 1948, and by the House on June 16, 1948. (Pub. Law 773.) We think it clear that Congress would not have intended to repudiate an important principle under the antitrust laws so recently affirmed by this Court without adverting in some way to either the principle or this Court's decision.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for writ of certiorari should be granted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

DECEMBER 1948.

APPENDIX

EXHIBIT A

Motion to Transfer filed on August 5, 1948, by National City Lines, Inc., American City Lines, Inc., and Pacific City Lines, Inc.

Said defendants move that the above entitled action be transferred to the District Court of the United States for the Northern District of Illinois, Eastern Division, upon the ground that such transfer is necessary for the convenience of parties and witnesses and is in the interest of justice. Said motion will be based upon Section 1404 (a) of Title 28 of the United States Code; upon the files and records of the above entitled action and particularly upon the affidavits of the following persons, filed on the dates set forth immediately after their names:

E. Roy Fitzgerald, August 11, 1947;
C. Frank Reavis, August 11, 1947;
C. Frank Reavis, September 11, 1947;
C. Frank Reavis, September 15, 1947;
Jackson W. Chance, August 28, 1947;
H. H. Hollinger, September 11, 1947;
Joseph Thomas, September 11, 1947;

the affidavit of E. Roy Fitzgerald filed concurrently herewith; upon the Findings of Fact made and filed by the Court in the above entitled action on October 15, 1947; upon the opinion of the above entitled Court filed herein on Septem-

ber 29, 1947 (7 F. R. D. 456); upon the opinion of the above entitled Court filed August 14, 1947, in *United States of America* vs. *National City Lines, Inc., et al.*, Criminal Action No. 19270 CR (7 F. R. D. 393), and upon the accompanying memorandum of points and authorities.

EXHIBIT B

Opinion by District Judge Leon R. Yankwich
Filed October 12, 1948

I

THE MOTION TO TRANSFER

This civil action seeking injunctive and other relief against the defendants for violation of the Sherman Anti Trust Act[1] was instituted on April 10, 1947. On September 29, 1947, I granted the motion of the defendants to dismiss the action on the ground that our district was an inappropriate forum for its maintenance and prosecution.[2] On direct appeal to the Supreme Court, pursuant to the special provision of the Judicial Code,[3] that Court reversed the order upon the ground that the doctrine of *forum non conveniens* does not apply to civil actions of this character, in which the choice of venue is determined by Section 12 of the Clayton Act.[5]

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[1] 15 U. S. C. A., Sec. 4.

[2] *United States* v. *National City Lines, Inc.*, 1947, D. C. Calif., 7 F. R. D. 456.

[3] 15 U. S. C. A., Sec. 29.

[4] *United States* v. *National City Lines*, 1947, D. C. Calif., 7 F. R. D. 393.

[5] 15 U. S. C. A., Sec. 22.

After the return of the mandate to this Court, the defendants moved to transfer the cause to the district court for the Northern District of Illinois, Eastern Division, the district to which a companion criminal prosecution against nine corporate defendants involved in this action and seven individuals, originally instituted in this district, was transferred by me on August 14, 1947.[6] The transfer was made under the provision for change of venue contained in the Federal Rules of Criminal Procedure.[7]

The motion to transfer the present proceeding is made under a new section of the revised Judicial Code, which went into effect September 1, 1948.[8]

The Government resists the motion and has filed a countermotion to strike the motion to transfer.

II

CHANGE OF VENUE

In the main, the position of the parties to this litigation is the same as to both motions. For, in the last analysis, it relates to the applicability or non-applicability of the new provision for the transfer of civil actions to other districts to an action of this character, which reads:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer *any civil action* to any

[6] *United States* v. *National City Lines*, 1947, D. C. Calif., 7 F. R. D. 393.

[7] Rule 21 (b), Federal Rules of Criminal Procedure, 28 U. S. C. A. foll. Sec. 732 (c).

[8] 28 U. S. C., Sec. 1404 (a).

other district or division where it might have been brought.[9] [Emphasis added.]

The clause is part of a section which the Revisers have entitled, "Change of Venue", and which also allows the transfer of civil actions from one division to another,[10] and the trial of any civil action at any place within the Division.[11]

A consideration of this enactment calls for certain general and almost obvious observations.

We are not dealing with an *amendatory* statute, but with a revision of the entire Judicial Code, the first one attempted since 1911. This aim was set forth with thorough emphasis in the Reports of the Senate and House Judiciary Committees. The Senate Committee on the Judiciary, in its Report to accompany H. R. 3214, stated:

> It is evident, therefore, that *a thorough codification and revision of the statutes* relating to the judiciary and *its procedure* is very much in the public interest in order that the law in this important field may be *clear, certain and readily available.*
>
> The bill H. R. 3214 accomplishes these desirable results. The statutory material presently in force has been arranged in the bill *in a logical and consistent way*, rendering it easily ascertainable. *Existing inconsistencies and ambiguities have been removed and obsolete and archaic provisions eliminated or modernized.*
>
> By enacting this bill into positive law as title 28 of the United States Code, *that title will thereby become the law rather than merely presumptive evidence of the law,*

[9] 28 U. S. C., Sec. 1404 (a).
[10] 28 U. S. C., Sec. 1404 (b).
[11] 28 U. S. C., Sec. 1404 (c).

and reference to prior volumes of the Statutes at Large will be rendered wholly unnecessary.[12] [Emphasis added.]

The Report of the House Committee on the Judiciary, dated April 25, 1947, which accompanied the Resolution, stressed the object of the resolution *"to revise, codify and enact into law"*.[13] It called attention to the changes in the national scene which "make imperative this *revision* of the Judicial Code."[14] [Emphasis added.]

Professor James Wm. Moore, who was one of the consultants on the revision, stated, on March 7, 1947, at the hearing before Subcommittee No. 1 of the House Judiciary Committee:

> *The revision is a statement of the law and not merely presumptive. If enacted, the revision will state the law on matters covered by it.*[15] [Emphasis added.]

He added:

> Now, however, in attempting a revision of what is essentially only one title of the United States Code, it seems proper to state *what the law is and not make the revision merely presumptive of the law. The Federal judiciary, practitioners, and other interested parties, are entitled to that much certainty.*[16] [Emphasis added.]

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[12] 28 U. S. C. Congressional Service, p. 1675–1676. (Senate Report No. 1559, 80th Congress, Second Session.)

[13] 28 U. S. C. Congressional Service, p. 1692. (House Report No. 301, 80th Congress, First Session.)

[14] 28 U. S. C. Congressional Service, p. 1693. (House Report No. 301, 80th Congress, First Session.)

[15] 28 U. S. C. Congressional Service, p. 1967.

[16] 28 U. S. C. Congressional Service, p. 1968.

These facts are important. For, in attempting to discern the purpose of the enactment, we are, at the outset, confronted with the proposition that it created a *new procedural* scheme, namely, a method of transferring cases from one district to another, which did not exist before. This was accomplished not by amending existing law, but by including the particular provision in a single piece of legislation, the object of which was to enact a revised code dealing with the jurisdiction of, and procedure in, the courts of the United States.

In endeavoring to achieve this object, the Congress strove to attain uniformity and simplicity of expression. The various circumlocutions, which had heretofore been used to designate the varieties of actions, were abandoned and the phrase "civil action" was substituted. The reviser's notes, which the Committees made a part of their report to the two Houses of the Congress, reveal this intention. Indeed, this appears in the very section on change of venue.[17] The phrase "any civil action" is given as the equivalent of "any action, suit or proceeding of a civil nature" used in subdivision (b).[18] And the reviser's notes leave no

[17] 28 U. S. C., Sec. 1404 (a) (c).

[18] 28 U. S. C., Sec. 1404 (b). The following sections, among others, and the reviser's notes to them show intent to use the phrase *to cover civil cases of whatever nature*, in conformity with and maritime cases); 1335 (interpleader); 1336 (interstate commerce commissions orders); 1337 (commerce and anti-trust regulations); 1338 (patents, copyright, trademark, unfair competition); 1339 (procedural matters); 1340 (internal revenue and customs duties); 1343 (civil rights); 1344 (election disputes); 1346 (United States as defendant); 1347 (partition where United States is tenant); 1348 (bank associ-

doubt that this was their intention in the entire revision.[19]

III

THE MANNER OF CHANGING VENUE

The aim of the Congress in enacting the section allowing transfers from one district to another, and from one division to another, was to cover the entire field and set down the circumstances under which such transfers could be had, either by the consent of the parties, or upon a proper showing.

Professor Moore, in his statement before the Subcommittee of the House Judiciary Committee, made this very plain. He said:

> *Venue provisions have not been altered by the revision. Two changes of importance have, however, been made. Improper venue is no longer grounds for dismissal of an action in the Federal courts. Instead, the district court is to transfer the case to the proper venue.* See Section 1406. *And Section 1404 introduces an element of convenience which gives the court the power to transfer a case for the convenience of parties and witnesses to another district. Both of these changes were in line with modern State practice; and the provision for change of venue on the grounds of convenience is also embodied in the Bank-*

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ation as party); 1349 (federal corporation as party); 1350 (alien's action for tort); 1351 (actions against consuls); 1353 (actions on Indian allotments).

[19] By way of illustration, we append the reviser's notes to three of the sections referred to in the preceding Note:

"Section 1336—Section Revised:

"Based on title 28, U. S. C., 1940 ed. ##41 (27), (28) (Mar. 3, 1911, ch. 231, ##24 (27), (38), 207, 36 Stat. 1091, 1148;

> *ruptcy Act for corporate reorganization, section 118, Eleventh United States Code, Section 518.*[20] [Emphasis added.]

The reviser's notes to the section state:

> Subsection (a) was drafted in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, *even though the venue is proper.* As an example of the need of such a provision, see *Baltimore & Ohio R. Co. v. Kepner,* 1941; 62 S. Ct. 6, 314 U. S. 44, 86 L. Ed. 28, *which was prosecuted under the Federal Employer's Liability Act in*

Oct. 22, 1913, ch. 32, 38 Stat. 219). Words 'Except as otherwise provided by enactment of Congress' were inserted because of certain similar cases of which the courts of appeal are given jurisdiction. (See, for example, section 21 of title 15, U. S. C., 1940 ed., Commerce and Trade).

"Words 'any civil action' were substituted for 'all cases' and 'cases' in view of rule 2 of the Federal Rules of Civil Procedure.

"Changes were made in phraseology."

"Section 1337—Section Revised:

"Based on title 28, U. S. C., 1940 ed., #41 (8), (23) (Mar. 3, 1911, ch. 231, #24, pars. 8, 23, 36 Stat. 1092, 1093; Oct. 22, 1913, ch. 32, 38 Stat. 219). Words 'civil action' were substituted for 'suits' in view of rule 2 of the Federal Rules of Civil Procedure. Changes were made in phraseology."

"Section 1338—Section Revised:

"Based on title 28, U. S. C., 1940 ed., ##41 (7) and 371 (5) (Mar. 3, 1911, ch. 231, ##24, par. 7, 256, par. 5, 36 Stat. 1092, 1160)."

"Section consolidates section 41 (7) with section 371 (5) of title 28, U. S. C., 1940 ed., with necessary changes in phraseology. Words 'of any civil action' were substituted for 'all suits at law or in equity' and 'cases' to conform section to rule 2 of the Federal Rules of Civil Procedure" (28 U. S. C. Congressional Service, p. 1838).

[20] 28 U. S. C. Congressional Service, p. 1969.

New York, although the accident occurred and the employee resided in Ohio. The new subsection *requires* the court to determine that the transfer is necessary for convenience of the parties and witnesses, and further, that it is in the interest of justice to do so."[21] [Emphasis added.]

It is, therefore, evident that the aim of the Congress was (1) to establish, through this revision a single procedural scheme to cover all incidences of procedure in the federal courts not provided for by the Rules of Civil Procedure; and (2) to apply the provisions, *except where otherwise indicated, to all civil actions,* of whatever nature.

The aim being procedural, it is axiomatic that, unless the contrary appears, the provisions are applicable to pending proceedings.[22]

The principle which forbids application of new enactments or revisions to pending actions applies to statutes dealing with substantive rights only.[23]

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[21] 28 U. S. C. Congressional Service, p. 1853.

[22] 50 Am. Jur., Statutes, Sec. 482; *Campbell* v. *Holt*, 1885, 115 U. S. 620; *Wm. Danzer Co.* v. *Gulf R. R.*, 1925, 268 U. S. 633; *Graham & Foster* v. *Goodcell*, 1931, 282 U. S. 409, 418; *Funkhouser* v. *J. B. Preston Co.*, 1933, 290 U. S. 163, 167; *In re Monser*, 1935, 7 Cir., 74 F (2) 411; *United States* v. *Standard Oil Co.*, 1937, D. C. Calif., 21 Fed. Sup. 645, 660; *Connell* v. *City of Jerseyville*, 1938, 7 Cir., 96 F (2) 392, 400; *Bowles* v. *Strickland*, 1945, 7 Cir., 151 F. (2d) 419.

[23] 50 Am. Jur., Statutes, Secs. 476, 477; *United States* v. *Heth*, 1806, 3 Cranch, 398, 413; *Railroad Co.* v. *Grant*, 1878, 98 U. S. 398; *White* v. *United States*, 1903, 191 U. S. 545; *Winfree* v. *Northern Pacific Ry.*, 1913, 227 U. S. 296; *Shwab* v. *Doyle*, 1922, 258 U. S. 529, 535; *United States* v. *Magnolia Petroleum Co.*, 1928, 276 U. S. 160, 163; *Hassett* v. *Welch*, 1938, 303 U. S. 303, 314; *Claridge Apts.* v. *Commis-*

At times, it is difficult to draw a distinct line between substantive law and procedure. And many procedural changes have, historically, had a lasting effect on substantive rights, as, for instance, the rule allowing the jury to judge both the law and the facts in criminal libel.[24] Nonetheless, matters of venue and change of venue are, as a rule, mere incidences of procedure. And statutes relating to remedies and procedure operate retrospectively.[25]

IV

CHANGE OF VENUE IN ANTITRUST CASES

These premised, we come to the nub of the controversy, which is:

Does the provision for transfer apply to the present action?

I am of the view that it applies to *all* pending civil cases, as readily appears from the legislative history and the legal principles just considered. And it applies to antitrust cases unless we can find in the decision of the Supreme Court in the present case language indicating that the special venue statute in antitrust cases,[26] as the Supreme Court construes it, immunizes such actions against a general transfer enactment of the type under consideration, as the Court has held it protects it from the impact of the doctrine of *forum non conveniens*.

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sioner, 1944, 323 U. S. 141, 164; *Commissioner* v. *Commodore*, 1943, 6 Cir., 135 F. (2d) 89, 91–92.

[24] Yankwich, Essays in the Law of Libel, 1929, pp. 267–272.

[25] See cases cited in Note 22. And see, *Richard* v. *National City Bank*, 1934, D. C. N. Y., 6 Fed. Sup. 156; *Benas* v. *Maher*, 1942, 8 Cir., 128 F. (2d) 247, 251.

[26] 15 U. S. C. A., Sec. 29.

So it becomes imperative to analyze the language of the Court in its proper setting. The gist of the majority opinion is contained in the statement of Mr. Justice Rutledge:

> When, therefore, Congress came to face the problem of making the nation's antitrust policy more effective through the Clayton Act's provisions, that body was not confronted with any problem of abuse by plaintiffs in selecting venue for antitrust suits; nor was it concerned with any question of providing means by which the defendants in such suits might defeat the plaintiff's choice to serve their own convenience. *Congress' concern was quite the opposite. It was to provide broader and more effective relief, both substantively and procedurally, for persons injured by violations of its antitrust policy.* Insofar as convenience in bringing suit and conducting trial was involved, *the purpose was to make these less inconvenient for plaintiffs or, as was said in the Eastman opinion, to remove the "often insuperable obstacle" thrown in their way by the existing venue restrictions.*
>
> To have broadened the choice of venue for the reasons which brought about that action, only to have it narrowed again by application of the vague and discretionary power comprehended by *forum non conveniens* would have been incongruous, to say the least. In making the change Congress did not authorize plaintiffs to institute civil antitrust suits in the newly specified districts, merely in order to have them transferred back for trial to one of the districts comprehended by #7. *It intended trial to take place in the district*

specified by the statute and selected by the plaintiff.[27] [Emphasis added.]

The Government sees in the last italicized sentence a declaration that the institution of the action, and the consequent right to choose venue, imply the *absolute right of trial* in the place chosen.

We need not consider the contention of the defendants that the legislative history *does not* support the Court's interpretation. We cannot make our own gloss in a matter in which the Supreme Court has spoken so recently. We must give to the language used its full implication. So doing, however, we must bear in mind the theoretical basis of the opinion.

It was the Government's contention before the high court, *as it was before me,* that the doctrine of *forum non conveniens does not apply to actions instituted under special venue statutes.* Mr. Justice Jackson, who wrote the majority opinion in the Gulf[28] and Koster[29] cases, adopted this view as flowing from those decisions. In his concurring opinion in this case, in commenting on those cases, he says:

> We have just had occasion to review and to decide by a divided Court, cases involving the doctrine of forum non conveniens. *Gulf Oil Corp* v. *Gilbert,* 330 U. S. 501; *Koster* v. *Lumbermen's Mutual Casualty Co.,* 330 U. S. 518. We there held that, in cases where the plaintiff was in court in an ordinary civil suit only by reason of the

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[27] *United States* v. *National City Lines, Inc.,* 1948, 334 U. S. 573, 581.

[28] *Gulf Oil Co.* v. *Gilbert,* 1947, 330 U. S. 501.

[29] *Koster* v. *Lumbermen's Mutual Co.,* 1947, 330 U. S. 518.

venue statutes that apply generally, the jurisdiction if the circumstances of the court could exercise discretion in dismissing complaints to prevent imposition on its particular case showed an abuse of the option vested in plaintiff by the general venue statutes. *But we also pointed out that, where the choice of forum was authorized by a special venue statute, this discretion to dismiss* would not be implied. The distinctions there made between general and special venue statutes may have been overly simple from the viewpoint of the dialectician. *But as working tools of everyday craftsmen they do serve to point out a difference that I think governs here.*[2]

Under this view of the law, the doctrine of *forum non conveniens* would apply only to cases arising under *general venue statutes.* It would not apply to those brought under *special venue statutes,* such as the Federal Employers' Liability and the Anti Trust statutes. But the majority opinion *did not so hold.* It did not choose to establish a principle to serve as a guide in all cases. It preferred to hold merely that *the history of anti trust legislation shows an intent not to limit the choice of forum by the application of the doctrine of forum non conveniens.* And it interpreted its prior decisions as applying the same principle to the *Federal Employers' Liability* statute, in the light of its particular history. So the language of the majority opinion, when read in this perspective, means simply that, because of the legislative history of anti trust laws, the court declined to allow the application to them

[2] *United States* v. *National City Lines, Inc.*, 1948, 334 U. S. 581.

of the doctrine of *forum non conveniens*. So, any implication of absolute choice of place of trial in anti trust cases must be read in that light. They stand proof against interference by the application of the doctrine of *forum non conveniens*. But are they impregnable to the legislative power of the Congress which granted the choice of forum in the first instance? I think not. The legislative history of the revision of the Judicial Code shows that the intent of the Congress was to overcome the absolute choice in cases of this character, in which the court's interpretation had resulted. And the "legislative intent" they sought to overcome was *their own* as found by the Court. The reviser's Notes and Professor Moore's statements, already referred to,[31] make this quite plain. The

[31] See Notes 18, 19, 20, 21. In a recent address, Mr. Justice Jackson pointed out some of the difficulties inhering in any attempt to determine the meaning of a statute by legislative history. He said:

"I am coming to think it is a badly overdone practice, of dubious help to true interpretation and one which poses practical problems for a large part of the legal profession. The British courts, with their long accumulation of experience, consider Parliamentary proceedings too treacherous a ground for interpretation of statutes and refuse to go back of an Act itself to search for unenacted meanings. They thus follow Mr. Justice Holmes' statement, made, however, before he joined the Supreme Court, that 'We do not inquire what the legislature meant, we ask only what the statute means.' And, after all, *should a statute mean to a court what was in the minds but not put into the words of men behind it, or should it mean what its language reasonably conveys to those who are expected to obey it?*" (Jackson, Problems of Statutory Interpretation, 1948, 8 F. R. D., 121, 124.) [Emphasis added.]

The answer to the alternative is that given by the Supreme Court in an opinion in which Mr. Justice Holmes concurred:

reference is only to the Kepner case.[32] Obviously, because the notes antedate the decision in the

"Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion." (*Caminetti* v. *United States*, 1917, 212 U. S. 470, 485). (And see, *United States* v. *American Trucking Assn.*, 1940, 310 U. S. 534, 543. Divergent views on the function of courts in such cases are expressed by Max Radin, 1929, Statutory Interpretation, 43 Harvard Law Rev. 863, 881–883, which comments on the Caminetti case in Note 38, and James M. Landis, 1929, A Note on "Statutory Interpretation," 43 Harvard Law Review, 886, 889–893).

And when, as here, the language is explicit, resort to legislative history merely serves to show that the statute actually "means" what the legislature "meant." Differently put, legislative history simply corroborates the obvious meaning of the language used in the law. (See, *Taub* v. *Bowles*, 1945, U. S. Em. App., 149 F. (2d) 817, 819–821.) To read exceptions into such language is to disregard the evident. This we cannot do, especially when we are dealing, not with an amending act, but with an entire code revision. (See, *United States* v. *Nischo*, 1923, 262 U. S. 165, 168–169; *United States* v. *Flores*, 1933, 289 U. S. 137, 148–151; 50 Am. Jur., Statutes, Secs. 446, 454.) Under such circumstances, the doctrine of implied repeal need not concern us. More, as the discussion shows, the interpretation which we have adopted is not *inconsistent* with the right to choose venue. It merely subjects the choice to judicial qualification under definite conditions. The two provisions do not conflict. To the contrary, they supplement and complement each other.

The new provision does away with the right to dismiss for "improper venue." (See Statement of Professor Moore, quoted in Part III of the opinion.) The doctrine of *Forum non conveniens*, which allowed such dismissal if the forum be found inconvenient, disappears, and the right of transfer is substituted for it. We have clearly a complete and logical new scheme covering the entire field.

[32] *Baltimore & Ohio R. Co.* v. *Kepner*, 1941, 314 U. S. 44.

present case. They were placed before the Congress in March and April, 1948. The date of the decision was June 7, 1948. And the new Title 28 was approved on June 24, 1948.

One other observation. It is a fundamental rule of statutory interpretation that a statute general in its language is to be given general application.[33] No exceptions will be read into a statute of such character. The legislative history of the revision of this portion of the Judicial Code evidences an intention to follow the accepted pattern in this respect. This also appears from the

[33] 50 Am. Jur., Statutes, Secs. 432, 433.

"The court cannot add an exception on equitable grounds when Congress forbore to make such an exception." (*Louisville & Nashville R. R.* v. *Motley*, 1911, 219 U. S. 467, 479. And see, *Addison* v. *Holly Hill Fruit Products, Inc.*, 1944, 322 U. S. 607, 611; *United States* v. *Wishnatzki*, 1935, 2 Cir. 77 F. (2) 357, 358–359). Behind these rulings is the thought that when the words used in a statute are general, it is judicial usurpation not to give them the inclusiveness which their meaning denotes. So, in the Addison case just referred to, the Court refused to dilute the word "all" to "*substantially all.*" The Circuit Court of Appeals for the 2nd Circuit, speaking through Judge Frank, has expressed the same idea in this trenchant fashion:

"The familiar 'easy-to-say-so-if-that-is-what-was-meant' rule of statutory interpretation has full force here. The silence of Congress is strident. Judicial legislation is one of the facts of life, an inescapable and necessary one. But courts may not, as legislatures may, roam at large, confined only by the Constitution; their function, when dealing with legislative legislation, does not go beyond that of filling in small gaps left by the legislature—and to closing those gaps in accordance with what appears to have been the legislative purpose." (*Commissioner of Internal Revenue* v. *Beck's Estate*, 1942, 2 Cir., 129 F. (2) 243, 244, 245.)

use of the adjective "any", which is defined as follows:

> 1. One indifferently out of a number; one (or, as pl., some) indiscriminately of whatever kind; specif; (a) Indicating a person, thing, event, etc., as not a particular or determinate individual of the given category but whichever one chance may select; this, that, or the other; one or another; * * * (b) Indicating a person, thing, etc., as one selected without restriction or limitation of choice, with the implication that every one is open to selection without exceptions; * * * (c) Indicating one person, thing, etc., taken with indifference to quality; one or some, however excellent or poor (more often the latter); as, any plan would be better than no plan."[34]

"Any" covers everything in a category or class. Its use excludes exceptions unless they are specifically given. For its primary meaning is "one indefinitely, or indifferently, out of a number."[35] And that the aim was to use the word in that sense is evident from the legislative history already given. This is also apparent from the fact that whenever, in this revision, the Congress intended either the whole revision or a specific provision in it, *not* to apply, they made specific exceptions from the generic phraseology. An example of this is found in Section 2680, 28 U. S. C. The revisers, after recodifying the Tort Claims Act, specifically excluded from its operation twelve distinct types of claims, which would

[34] Webster's New International Dictionary, 1937 Ed., p. 1021.

[35] 3 C. J. S., Any, p. 1399.

have been included under the general terminology of the section.

So the whole scheme of the revision stands in the way of a construction which would exempt this special type of action from any of the incidences of procedure codified. More, this interpretation is not inconsistent with the aim of the special venue provision in antitrust cases.[36] *It stands unimpaired. The Government still has the choice of venue.*

However, the court may, under conditions prescribed by the Congress and "in the interest of justice", change the venue.

On the whole, therefore, there is no legal or factual reason for not giving full effect to the intention of the revisers in making this section applicable to antitrust actions.

V

THE DISCRETIONARY POWER TO TRANSFER

There remains the question: Do the facts warrant the granting of the motion?

A *Conditions for Transfer*

Before answering this question by reference to the facts, we consider briefly the meaning of the transfer provision.

The wording of the clause is different from that of the corresponding provision in the criminal rules. The latter calls for a transfer "if the Court is satisfied that in the interest of justice, the proceeding should be transferred."[37] The

[36] 15 U. S. C. A., Sec. 22.

[37] Rule 21 (b), Federal Rules of Criminal Procedure.

section under consideration provides for transfer "for the convenience of parties and witnesses, in the interest of justice."[38] While both sections use the identical phrase "in the interest of justice" as a criterion, the civil transfer rule uses the phrase in juxtaposition with the convenience requirement. But the meaning of the phrase is the same in both instances:

> It implies conditions which assist, or are in aid of or in the furtherance of, justice. Both call for the doing of things which bring about the type of justice which results when law is correctly applied and administered. They import the exercise of discretion which considers both the interests of the defendant and those of society. When commanded by a statute, they do not attempt to determine, in advance, the type of judicial action to be taken.[39]

In the case in which the phrase just quoted occurs, I considered the convenience of parties and witnesses as one of the criteria in determining whether a transfer should be made. And in the present case, I took into account the same element in considering the application of the doctrine of *forum non conveniens*.[40] In so doing, I did not weigh the convenience of the defendants only, but that of the Government also. The conclusion was arrived at after a balancing of conveniences. This is of the very essence of the

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[38] 28 U. S. C., Sec. 1404 (a).

[39] *United States* v. *National City Lines, Inc.*, 1947, D. C. Calif., 7 F. R. D. 393, 397.

[40] *United States* v. *National City Lines, Inc.*, 1947, D. C. Calif., 7 F. R. D. 456.

judicial process in any matter which calls for the exercise of discretion. Indeed, I wrote:

> A court of equity should aim to balance societal and individual interest and to maintain the proper equilibrium between private rights and public weal.[41]

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[41] *United States* v. *National City Lines, Inc.*, 1947, D. C. Calif., 7 F. R. D. 456, 466. And see, Yankwich, Increasing Judicial Discretion in Criminal Proceedings, 1941, 1 F. R. D. 746.

The importance of proper fact-finding by judges is stressed by Judge Frank in Re Fried, 1947, 2 Cir., 161 F. (2) 453, 462:

"Mistakenly to apply a rule to non-existent facts—to facts mistakenly 'found'—is no less unjust, no less a defective operation of judicial administration, than to apply an erroneous 'substantive' legal rule to the actual facts. Either way, the policy expressed in the correct rule is frustrated. An error in 'finding' the facts thus yields what might be called 'injustice according to law.' The facts involved in any case are past facts. They do not walk into the courtroom. Judicial fact-finding, a human process by which a man or some men attempt to reconstruct a segment of an 'objective' past, is necessarily fallible. For it is a job of history-writing, and, like all history-writing, inescapably involves 'subjective' factors and encounters other obstacles sometimes insurmountable. But courts cannot shirk that job. And acknowledgment that the process can never reach perfection does not excuse us from rendering it free of all practically avoidable defects."

He treats the problem more fully in Say It With Music, 1948, LXI Harvard Law Review, 921, 949–955.

Judge Frank's approach to this problem is but a part of his preoccupation with the nature of the judicial process, and of the function of the Judge in modern society. I have dealt with this subject on numerous occasions. See Yankwich, Some of the Social Phases of the Administration of Justice, 1932, 5 S. Cal. Law Review, 189, 207; Yankwich, The Judge in Modern American Society, 1935, 40 Commercial Law Journal, pp. 171 et seq.; Yankwich, Judge in a Progressive Society, 1939, 14 L. A. Bar, Ass'n Bulletin, pp. 297

The transfer provision which concerns us here depends on discretion for its application, as do the kindred provision in the criminal cases and the doctrine of inconvenient forum.

B. *Should the Discretion be Exercised?*

Having determined that the transfer provision is applicable to this litigation, our next inquiry is whether the discretion should be exercised under the facts in the case.

The factual situation did not change while the matter was before the Supreme Court. It is the same as existed when I granted the motion to dismiss. The affidavits filed with the prior motion have been refiled and adopted for the purposes of the present motions. The Government has filed no additional affidavits. But it was agreed at the hearing that the additional facts contained in the affidavit of Jesse R. O'Malley, one of counsel for the Government, in opposition to the affidavit of Denis B. Sullivan, filed in opposition to the Government's motion for an early trial date, might be considered. The affidavit merely recites that a transfer to the Northern District of Illinois, Eastern Division, might result in delay because of the crowded condition of the calendar of that court. It points to the fact that the transfer of the criminal case had resulted in delay.

Speculations as to possible time of trial are not determinative of the matter. Regardless of the condition of their calendars, district courts have it within their power to advance cases when pub-

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et seq.; and see, Yankwich, Findings in the Light of the Recent Amendments to the Rules of Civil Procedure, 1948, 8 F. R. D. —.

lic interest so requires. And if the need for immediate action is brought home to the judges of the District Court of Illinois, I am certain that they will arrange for as early a trial of this cause as could be had in this district. In the instant case, the Government could very readily have avoided the delay which resulted from its direct appeal from my ruling by refiling the case immediately in the Northern District of Illinois, Eastern Division, especially when the defendants had stipulated that they would not seek a dismissal if so refiled.[2]

I do not question the Government's right to seek the alternative of appeal in order to avoid a decision which it disapproved and which it did not desire to become established as an unchallenged precedent. However, in balancing the conveniences, we must exclude situations such as delay brought on by the voluntary act of the Government when it had another alternative.

I need not repeat the summary of the affidavits given in the two previous opinions.[3] Having reexamined them, and having considered the additional affidavits and facts in the record to which my attention has been called by both parties, I am of the view that the convenience of the parties and witnesses require the transfer of this case in the interest of justice.

Anticipating that such conclusion might be based on a balancing of conveniences, counsel for

[2] *United States v. National City Lines*, 1947, D. C. Calif., 7 F. R. D. 456, 466.

[3] *United States v. National City Lines*, 1947, D. C., Calif., 7 F. R. D. 393; *United States v. National City Lines*, 1947, D. C. Cal., 7 F. R. D. 456.

the Government intimated at the hearing that no resort could be had to such method in resolving the conflicting contentions. I agree that when the section speaks of the convenience "of parties and witnesses," it means that the convenience of both sides must be examined. But I know of no way of applying the requirement to a particular situation than by viewing the facts from both standpoints and giving preference to those which, in the court's opinion, preponderate to *such an extent as to make the choice in the interest* of justice. Unless the right to choose between conflicting facts or assertions exists, the court could never determine a motion under this section *on the facts*. For if the mere assertion by the Government of its own convenience and the convenience of its witnesses were sufficient to stay action, we would be confronted with a power to paralyze judicial discretion, beside which the devastating effect of the historic *liberum veto* ("Nie Pozwalan" — "I don't permit") of the Polish nobles in their Diet (1572–1697) would dim into insignificance.

As I cannot so interpret the meaning of the section, I conclude that the showing in this case warrants transfer to the Northern District of Illinois, Eastern Division.

C. *The Supreme Court did not Pass on the Facts*

This conclusion is reached on the conviction that the Supreme Court, in reversing the order of dismissal, did so solely on the ground that the doctrine of *forum non conveniens did not apply*

[1] 28 U. S. C. Sec. 1404 (a).

to antitrust actions. It did not undertake to determine whether the findings were supported by the evidence or there was abuse of discretion. The opinion of Mr. Justice Rutledge very pointedly states that the *sole question* which the Court was deciding was the applicability of the doctrine to cases of this character. The portions of the opinion which posit the problem read:

> The *principal question*, and the *only one* we find it necessary to consider, is whether the choice of forums given to the plaintiff by Section 12 is *subject to qualification* by judicial application of the doctrine of forum non conveniens. * * *
>
> The *only question* presented concerning the court's power is whether, having jurisdiction and venue of the cause and personal jurisdiction of the defendants, the court also *was authorized to decline to exercise its jurisdiction upon findings, without abuse of discretion*, that the forum was not a convenient one within the scope of the non-statutory doctrine commonly, though not too accurately, labeled *forum non conveniens*.
>
> It would serve no useful purpose to review in detail the reasoning or the authorities upon which the District Court ruled the doctrine applicable in such cases as this, or therefore the further groundings upon which it proceeded in holding the forum inconvenient. *For the view has prevailed without qualification during the life of Sec. 12, thirty-four years, that the choice of venues expressly given to the plaintiff is not to be qualified by any power of a court having venue under any of the section's alternatives to decline to exercise the jurisdiction conferred.* None of the decisions

> on which the District court relied, suggested, much less decided, that such a power exists. This therefore is a case of first impression, seeking departure from long-established practice. Moreover, the analogies drawn from other types of cases in which the doctrine has applied cannot survive in the face of the section's explicit terms and the patent intent of Congress enacting it."[45] [Emphasis added.]

The sufficiency of the facts, therefore, not having been determined by the Supreme Court, their revaluation is before me. On such revaluation, I conclude that the motion to transfer should be granted.[46]

Dated this 12th day of October 1948.

LEON R. YANKWICH, *Judge.*

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[45] *United States* v. *National City Lines, Inc.*, 1948, 334 U. S. 573, 575–578.

[46] After the foregoing opinion had been completed, I received a copy of the opinion of Judges Gunnar H. Nordbye and Matthew M. Joyce, of the District of Minnesota, in five companion cases—*Hayes* v. *Chicago, Rock Island & Pacific R. R. Co.*; *Hughes* v. *Chicago, Rock Island & Pacific R. R. Co.*; *Grulkey* v. *Chicago, Rock Island & Pacific R. R. Co.*; *Murphy* v. *Chicago, Rock Island & Pacific R. R.*; *Schirf* v. *Chicago, Rock Island & Pacific R. R. Co.* (Nos. 2719–2773 Civil, not yet published) rendered on September 25, 1948. In these actions, which arose under the Federal Employer's Liability Act, the defendant moved to change venue, for the convenience of parties and witnesses, under Section 1404 (a), 28 U. S. C. In granting the motion, the two judges reached the same conclusion I do on two points: (1) that the transfer provision applies to *all* civil cases, including those which—like the Federal Employer's Liability cases—are brought under a special venue statute, and (2) that it may be invoked in pending cases.

EXHIBIT C

Judgment and Order of Transfer signed October 27, 1948, and Entered by Clerk October 28, 1948

Findings of Fact and Conclusions of Law having heretofore been signed by the Court, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the above-entitled cause be and the same hereby is transferred to the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this cause be and the same hereby is dismissed as to defendant American City Lines, Inc., a corporation.

IT IS FURTHER ORDERED that the respective motions of each defendant for a more definite statement, and the motions of defendants National City Lines, Inc., American City Lines, Inc., Pacific City Lines, Inc., and Mack Manufacturing Corporation to dismiss or, in the alternative, to quash service of summons, be and each of them is hereby denied.

Done in open court this 27th day of October 1948.

LEON R. YANKWICH,
United States District Judge.

Exhibit D

Order Staying Transfer Signed November 29, 1948

This Court having previously entered an order on November 1, 1948, staying execution of the judgment and order entered on October 28, 1948, transferring this action to the United States District Court for the Northern District of Illinois, Eastern Division, until the 2nd day of December 1948, and it further appearing to the Court that the plaintiff intends to file with the Supreme Court of the United States on or before December 13, 1948, a motion for leave to file a petition for writ of certiorari under Section 1651 of Title 28, United States Code, to review said order of judgment and transfer.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the execution of the judgment and order entered on October 28, 1948, transferring the above-entitled cause to the United States District Court for the Northern District of Illinois, Eastern Division, be and it is hereby stayed until 5 p. m., December 13, 1948, and if it appears of record in this Court, on or before said date, by affidavit executed by one of the attorneys for the plaintiff herein, that the above-mentioned motion for leave to file a petition for writ of certiorari has been filed with the Supreme Court by the plaintiff, the execution of the judgment and order of transfer entered on October 28, 1948, shall be further stayed until twenty days after the Supreme Court shall have taken

final action with respect to the above-mentioned motion for leave to file a petition for certiorari either by denying said motion or, if the motion is allowed, by affirming or reversing the judgment and order of transfer entered by this Court on October 28, 1948.

Done in open Court this 29th day of November 1948.

LEON R. YANKWICH,
United States District Judge.